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No. 97-298

IN THE

Supreme Court of the United States

October Term, 1997

FLOTILLA, INC., a Florida Corporation,

Petitioner,

v.

FLORIDA GAME AND FRESH WATER FISH COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

WHETHER THE ELEVENTH AMENDMENT PERMITS A SUIT IN FEDERAL COURT, BY A FLORIDA CORPORATION, AGAINST AN ARM OF THE STATE OF FLORIDA, ABSENT A SPECIFIC LEGISLATIVE WAIVER OF ELEVENTH AMENDMENT IMMUNITY.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

While there were several parties listed on the opinion below, the only real party there, as here, is the Florida Game And Freshwater Fish Commission. Flotilla has acknowledged that in their petition, and therefore respondent's brief in opposition reflects only the one party.

TABLE OF CONTENTS

Page(s)

QUESTION FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The decision of the appellate court is not in conflict with any applicable Eleventh Amendment immunity decisions and the court did not hold that the status of the entity being sued, as opposed to the status of state law, determines whether or not a suit is against the state for Eleventh Amendment purposes . . . 3

II. This case does not involve any important questions of Federal law that have not been settled 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases — *Page(s)*

Aerojet General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971) 5

Florida Game and Fresh Water Fish Commission v. Flotilla,636 So.-2d 761 (Fla. 2d DCA 1994, *review denied* 645 So. 2d 452 (Fla. 1994) 2

Ford Motor Co. v. Department of Treasury, Etc., 323 U.S. 459 (1945) 5, 6, 7

Fouche v. Jekyll Island-State Park Authority, 713 F.2d 1518 (11th Cir. 1983) 7

Gamble v. Florida Department of HRS, 779 F.2d 1509 (11th Cir. 1986) 5

Hans v. Louisiana, 134 U.S. 1 (1890) 3, 8

Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985) 6

Hufford v. Rodgers, 912 F.2d 1338 (11th Cir. 1990) . . . 3, 8

In re. New York, 256 U.S. 490 (1921) 3

Pennhurst State School v. Halderman, 465 U.S. 89 (1984) 4, 8

Regents of the University of California et.al. v. Doe, U.S. 117 S.Ct. 900 (1997) 5, 6, 7

Schopler v. Bliss, 903 F.2d 1373 (11th Cir. 1990) 4

Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S.Ct. 1114 (1996) 3, 8

Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (11th Cir. 1994) *affirmed* ___ U.S. __, 116 S.Ct. 1114 (1996) 5

State Road Department of Florida v. Tharpe, 1 So. 2d 868 (Fla. 1941) 4

Tuveson v. Florida Governor's Council on Indian Affairs, 734 F.2d 730 (11th Cir. 1984) 4

Welch v. Texas Department of Highways and Public Transportation, 483 U.S. 468 (1987) 3, 4

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 7, 8

CONSTITUTIONAL PROVISIONS

Page(s)

Article 4, Section 6, Florida Constitution 6

Article 10, Section 3, Florida Constitution 4

STATUTES

Page(s)

42 U.S.C. §1983 . . . . . 1, 7, 8

§20.325, Florida Statutes 6

§372.03, Florida Statutes 6

§372.09, Florida Statutes 7

§372.12, Florida Statutes 6

Ch. 95-429, Laws of Florida (1995) 6

§768.28, Florida Statutes 4

§768.28 (17), Florida Statutes 4

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STATEMENT OF THE CASE

In 1991, Flotilla filed an action in federal court against the Florida Game and Fresh Water Fish Commission ("Commission") seeking monetary damages pursuant to 42 U.S.C. §1983, alleging a violation of its civil rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Prior to the commencement of the federal district court action, Flotilla had filed an inverse condemnation lawsuit in State court against the Commission. In that State court action, Flotilla claimed a violation of due process and equal protection rights pursuant to the Fifth and Fourteenth Amendments to the Constitution. An appeal of the State trial court's

decision resulted in a finding of no taking of Flotilla's property by the Commission. *Florida Game and Fresh Water Fish Commission v. Flotilla,* 636 So. 2d 761 (Fla. 2d DCA 1994), *review denied* 645 So. 2d 452 (Fla. 1994).

Flotilla's allegations in both State and Federal court arose from its attempt to develop a residential subdivision on 173 acres of undeveloped land; the discovery that bald eagles had established nests on a portion of the land; officials from the Florida Game and Fresh Water Fish Commission arriving to investigate possible criminal violations of State and Federal laws pertaining to eagles; and negotiations resulting in the establishment of a buffer area around the eagle nests.

Flotilla claims in their Statement of the Case that "The economic effect of the Commission's actions were absolutely disastrous to Flotilla", the Florida appellate court commented on that allegation (likewise made in the state court proceeding), as follows:

> Significantly, each phase of the project, except for the 24 acre preserve on phase four, was eventually sold to private contractors, although some at prices less than what Flotilla had hoped for.

Florida Game and Fish Commission v. Flotilla, 636 So. 2d at 763.

As Flotilla correctly discusses in their Statement of the Case, the Federal district court granted summary judgment in favor of the Commission, which judgment was affirmed on appeal to the Eleventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

I. The decision of the appellate court is not in conflict with any applicable Eleventh Amendment immunity decisions and the court did not hold that the status of the entity being sued, as opposed to the status of state law, determines whether or not a suit is against the state for Eleventh Amendment purposes.

This Court has made it clear that the Eleventh Amendment is a jurisdictional bar prohibiting suits in Federal court against states by their citizens. *Welch v. Texas Department of Highways and Public Transportation,* 483 U.S. 468 (1987); *In re New York,* 256 U.S. 490 (1921). More recently, this Court reaffirmed that immunity in *Seminole Tribe of Florida v. Florida,* __ U.S. __, 116 S.Ct. 1114 (1996), as follows:

> For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Hans, supra, at 15, 10 S.Ct., at 507. *Seminole Tribe of Florida,* 116 S.Ct. at 1122.

Flotilla has totally confused Eleventh Amendment immunity with State sovereign immunity. Eleventh Amendment immunity and sovereign immunity, while related, are doctrinally distinct, as recognized in *Hufford v. Rodgers,* 912 F. 2d 1338 (11th Cir. 1990). The Eleventh Amendment, a Constitutional provision, deals only with Federal jurisdiction to hear suits against the State, not with the State's immunity from suit in any forum. The Eleventh Amendment insulates the State from private parties seeking to impose damages in Federal court which must be paid from public funds. State

sovereign immunity, on the other hand, is a common law doctrine which serves to insulate States from lawsuits in their own courts.

Flotilla predicates its Petition to this Court on *State Road Department v. Tharpe,* 1 So. 2d 868 (Fla. 1941), claiming that under the facts in *Tharpe,* the Supreme Court of Florida found a waiver of sovereign immunity, that, according to Flotilla should carry over to the case before this Court. *Tharpe has no applicability to this case nor to any discussion of Eleventh Amendment immunity.* Eleventh Amendment immunity was never mentioned in *Tharpe.* The court said that the then existing laws of Florida (1941) permitted a suit against the State *in State court* for inverse condemnation or breach of contract. *Tharpe,* 1 So. 2d at 860. More importantly, *Tharpe* predated Article 10, Section 3, Florida Constitution (1968) which says:

> Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted §768.28, Florida Statutes which was a limited waiver of immunity for tort actions in *State courts,* and specifically preserved Florida's Eleventh Amendment immunity from suit in Federal courts, "unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court." §768.28 (17), Florida Statutes.

This Court has previously held, on more than one occasion, that a State does not waive Eleventh Amendment immunity in Federal court by waiving sovereign immunity in its own courts. *Welch v. Texas Department of Highways,* 483 U.S. 468 (1987); *Pennhurst State School v. Halderman,* 465 U.S. 89 (1984). *See also, Schopler v. Bliss,* 903 F. 2d 1373 (11th Cir. 1990) and *Tuveson v. Florida Governor's Council on Indian Affairs,* 734 F. 2d 730 (11th Cir. 1984). Lest there be any doubt, Florida has not waived its Eleventh Amendment

immunity. *Seminole Tribe of Florida v. State of Florida,* 11 F. 3d 1016 (11th Cir. 1994), *affirmed* __ U.S. __, 116 S.Ct. 1114 (1996); *Gamble v. Florida Department of HRS,* 779 F. 2d 1509 (11th Cir. 1986).

In addition to the *Tharpe* State court decision, Flotilla bases its Petition to this Court on two other cases, neither of which supports Flotilla's argument. However one case supports the Commission's argument in opposition to the Petition. Flotilla cites *Ford Motor Co. v. Department of Treasury, Etc.,* 323 U.S. 459 (1945), for the proposition that the Federal courts should look to State law in determining a State immunity question and whether or not there has been a waiver thereof. In the *Ford Motor Co.* case this Court reiterated that the Eleventh Amendment, "denies to the federal courts authority to entertain a suit brought by private parties against the state without it consent." *Ford Motor Co.,* 323 U.S. at 464. This Court went on to say that the only way the State could waive the Eleventh Amendment immunity was by a *legislative act,* which they had not done.

The other case cited by Flotilla, *Aerojet-General Corporation v. Askew,* 453 F. 2d 819 (5th Cir. 1972), is likewise inapplicable because factually, the court found that the subject matter of the lawsuit (land) was not titled in the name of the State of Florida and therefore there was no Eleventh Amendment immunity.

Comment on Flotilla's argument about reference to State law is needed. The Federal courts are required to examine State law in an Eleventh Amendment immunity claim; however it is for the purpose of examining the entity being sued in order to determine if it is an "arm of the State". As this Court recently said in *Regents of the University of California, et.al. v. Doe,* __ U.S. __, 117 S.Ct. 900 (1997):

> When deciding whether a state instrumentality may invoke the State's immunity, our cases

> have inquired into the relationship between the State and the entity in question.

Regents, 117 S.Ct. at 904. And further:

> [T]hat federal question can be answered only after considering the provisions of state law that define the agency's character.

Regents, 117 S.Ct. at 904, n. 5.

The "agency's character" likewise caused the courts below to find that Flotilla's action was brought against an arm of the State of Florida. The inquiry as to what is an "arm of the State" is made by reference to State law and:

> Factors that bear on this determination include the definition of 'state' and 'political subdivision'; the degree of control over the entity; and the fiscal autonomy of the entity.

Harden v. Adams, 760 F.2d 1158, 1163 (11th Cir. 1985).

The Commission specifically comes under the Executive Branch of Florida government, with the head of the Commission being appointed by the governor. §20.325, Florida Statutes; Article 4, Section 6, Florida Constitution. By statute, the headquarters of the Commission is in the State Capitol building or other State owned buildings. §372.03, Florida Statutes. The Commission has the power to acquire, *with the approval of the governor, in the name of the state,* lands for the preservation of game. §372.12, Florida Statutes.

The most significant factor demonstrating that the Commission's umbilical cord is firmly attached to the State is the Commission's dependency on the Legislature for its annual funding. The 1994–1995 fiscal year appropriation for the Commission was $48,000,000.00. Ch. 95-429 at 3939–3942, Laws of Florida (1995). Flotilla's *Ford Motor Co.* case, from

this Court, held that suit is barred against State agencies when the recovery would come from the State treasury. *Ford Motor Co.*, 323 U.S. at 464. That position was expanded this year by *Regents of the University of California*, which held that the entity's potential legal liability is relevant to an Eleventh Amendment question. *Regents*, 117 S.Ct. at 904.

Significantly, the court in *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518, 1520 (11th Cir. 1983), found that:

> Even though the Park Authority can raise money through the issuance of bonds and from the operation of Jekyll Island State Park, its fiscal life is controlled by the state.
>
> As noted above, its budget is submitted to the General Assembly.

Finally, while the Commission generates income from licenses, fines and other sources which go into the State Game Trust Fund, the Commission is prohibited from obligating itself beyond the monies in the Trust Fund, unless authorized by the Legislature. §372.09, Fla. Stat. (1995).

In addition to the above Eleventh Amendment immunity argument, upon which both the trial and appellate courts below based their opinions, it is significant that Flotilla's complaint was specifically brought pursuant to 42 U.S.C. §1983. In 1988, this Court in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1988), determined that States were not "persons" within the meaning of §1983, and held as follows:

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh

> Amendment bars such suits unless the State has waived its immunity.

Will, 491 U.S. at 66. And in *Pennhurst, supra,* this Court specifically held that Federal courts are barred from granting any relief on a §1983 claim against a State.

Once again, the State sovereign immunity Flotilla argues has no application to claims in Federal court under §1983. Federal law determines whether particular entities are subject to suit. *Hufford v. Rodgers, supra.*

The Eleventh Circuit's decision does not conflict with a decision of another court of appeals, or a decision of the Florida court of last resort. Certiorari review is not warranted. Supreme Court Rule 10(a).

II. This case does not involve any important questions of Federal law that have not been settled.

From *Hans v. Louisiana,* 134 U.S. 1 (1890) to *Seminole Tribe of Florida v. Florida,* __ U.S. __, 116 S.Ct. 1114 (1996), the Eleventh Amendment has been held to be a bar to suits brought against a State in Federal court by its own citizens. As discussed above, Florida law clearly establishes that the Commission is an arm of the State of Florida. Consequently, Flotilla's §1983 claim is effectively against Florida as a State. It is well settled that a State is not a person for actions brought pursuant to 42 U.S.C. §1983, which does not abrogate the Eleventh Amendment.

Under all of the above, well-established principles of law, the Eleventh Circuit's decision was correct. That decision did not decide an important question of Federal law that should be settled by this Court. Again, Certiorari review is not warranted. Supreme Court Rule 10(c).

CONCLUSION

The respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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